SUPREME COURT, U.S.
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Case No. 00-911

IN THE
SUPREME COURT OF THE UNITED STATES

CECIL WILLIAM COX, *Petitioner*,

v.

MICHAEL W. MOORE, Secretary,
Florida Department Of Corrections, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI FROM
THE ELEVENTH CIRCUIT COURT OF APPEALS

BRIEF OF RESPONDENT IN OPPOSITION

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COUNSELS FOR RESPONDENT

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QUESTIONS PRESENTED

Petitioner, Cox, presents five questions to this Court, only one of which, question 5, was presented to the Eleventh Circuit:

1. Whether 28 USC § 2254(d)(1) requires a showing of essentially the same facts and issues before a federal court may adjudicate the merits of the claim adjudicated in state court?

2. Whether in the context of a challenge to a guilty plea by a state prisoner must the state court specifically reject an opinion of the Supreme Court of the United States in order to justify granting the writ.

3. Whether the state court conclusion that a Florida statute, which was established to alleviate overcrowded prison conditions by providing provisional gaintime awards, was merely procedural and, therefore, gaintime awards could be granted or taken away without ex post facto restrictions was contrary to or involved an unreasonable application of existing United States Supreme Court precedent, Weaver v. Graham, 450 U.S.24, 101S.Ct. 960, 67 L.Ed.2d 17 (1981)

4. Whether, like regular gaintime, prison overcrowding gaintime could constitute a part of a sentence as to constitute a significant factor for both a defendant entering into a plea bargain and the trial court's calculation of the sentence to be imposed under Lynce v. Mathis, 519 U.S. 433, 445-46, 117S.Ct. 891, 137 L.Ed.2d63(1997), Quoting Weaver v. Graham, 450 U.S.24, 101S.Ct. 960, 67 L.Ed.2d 17 (1981)

5. Whether trial counsel was constitutionally ineffective for advising the petitioner that because of entitlement to overcrowding gaintime credit, petitioner would serve no more than twenty percent of an agreed sentence, upon which advice the defendant/petitioner relied; but for the advice of counsel,

petitioner would have persisted in his not guilty plea and insisted on trial by jury.

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OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is an unpublished affirmance issued by the Eleventh Circuit Court of Appeals on August 28, 2000.(A 69-71).[1] The decision affirmed a District Court's unreported order denying habeas relief.(A 59-64)

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[1] The symbol"A" followed by the appropriate number represents a citation to the materials contained in the Petitioner's Appendix to his petition.

JURISDICTION

Cox seeks review pursuant to 28 U.S.C. §1254(1) of a unpublished decision of the Eleventh Circuit filed on August 28, 2000. This Court has jurisdiction.

In order to obtain review under 28 U.S.C. §1254(1), petitioner must show that the Eleventh Circuit was presented and passed on the questions raised in his petition. Campbell v. Louisiana, 523 U.S. 392, 118 S. Ct. 1419, 140 L.Ed.2d 551 (1998), City of Springfield v. Kibbe, 480 U.S. 257, 107 S.Ct. 114, 94 L.Ed.2d 293 (1987) This Cox cannot do.

In his statement of the case, Cox acknowledges that the petition for writ of habeas corpus raised two issues. These issues were, whether his counsel was ineffective, and whether his plea was voluntary.(Petition 5) The Eleventh Circuit granted a certificate of appealability on two issues; 1) whether counsel was ineffective for having advised appellant at the time he entered his plea that he would only serve 8 to 10 years of his 40 year term, and 2) whether appellant's plea was knowing and voluntary. No other issues were presented before the appellate court.(A 67) If Cox had federal claims other than ineffective assistance and voluntariness he should have raised them in his federal habeas petition. He did not. Thus, the questions presented, herein, which were not passed upon by the Eleventh Circuit should not be entertained by this Court.

Respondent maintains that petitioner has failed to establish a basis under 28 U.S.C. §1254 for certiorari review on the first four of his five proposed questions for review as these claims were not passed on by the Eleventh Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent accepts petitioner's list of constitutional and statutory provisions.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's rendition of the history of the case with the following additions.

Petitioner Cecil William Cox was indicted for the first degree murder of Eric Barber. Cox plead nolo contendere to second degree murder on August 6, 1990. On October 26, 1990, Cox was sentenced to forty years imprisonment.(A 60)

Cox filed a motion for post conviction relief in state court seeking to withdraw his plea. He alleged counsel was ineffective for providing erroneous advice regarding the availability of provisional credits and that as a result the plea was involuntary because he was lead to believe that he would serve only eight years in prison.(A 3) The state court held an evidentiary hearing and found that the decision to enter the plea was a result of many factors. The state court specifically rejected Cox's assertion that he would not have plead but for the advice that provisional credits were available. The court found that it was not clear that counsel's advice was deficient as the statutes provided for the availability of such credits at the time of Cox's commission of his offense.(A 14) In any event, the state court found that Cox has not established prejudice and had not established that he would not have entered the plea.(A 6-7, 14-21) In the context of Cox's right to withdraw the plea the trial court discussed the difference between gaintime statutes and overcrowding release statutes and found that incorrect information on collateral matters was not a basis to withdraw the plea.(A 16-17)

In his federal habeas petition and in the Eleventh Circuit, Cox raised only the issues of whether the plea was voluntary and whether counsel was ineffective. (A 27-28, 67-68)

REASONS FOR DENYING THE WRIT

THE DECISION OF THE COURT BELOW IS THE CORRECT STATEMENT OF THE LAW AND THUS ISSUANCE OF THE WRIT SHOULD BE DENIED.

In this petition for a writ of certiorari, Cox contends that this Court should grant review of the unpublished decision of the Eleventh Circuit affirming the District Court as the decision resolved an important question of federal constitutional law. The Respondent disagrees and urges this Court to deny review.

Petitioner raised below, in the District and Circuit Courts, the issue of ineffective assistance of counsel predicated upon counsel's advice relating to overcrowding release credits. The essence of the claim was that he plead because his lawyer told him he was eligible for early release credits which would reduce his sentence. The prison system denied the credits and Cox challenged his lawyer's advice. There is no question that the state and federal courts applied the correct case law to this issue for the issue was evaluated in terms of deficient performance and prejudice as mandated by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1977), and Hill v. Lockhardt, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) The state court held an evidentiary hearing and found Cox had not established prejudice. In ruling on the federal habeas petition, the federal magistrate reviewed the record and also found no prejudice. Unlike Glover v. United States, No. 99-8576 (January 9, 2001), the issue was not whether prejudice could arise in such a situation but whether petitioner proved prejudice under the facts of his case. The District Court, based on an intervening Florida case which held that inmates in Cox's situation were entitled to the credits as stated by Cox's lawyer, found no deficient performance because the lawyer was correct and also found no prejudice was established. The Eleventh Circuit adopted the ruling of the district court finding that Cox had failed to establish either deficient

performance or prejudice. Whether one applies the limited review standards set out by the majority in Williams v. Taylor, 529 U.S.362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), or whether independent federal review is available, Cox still had to show deficient performance and prejudice. Cox has not and cannot show deficient performance and prejudice.[2] Thus, he is not entitled to relief based on question 5 as presented.

Furthermore, petitioner has failed to show that the decision of the Eleventh Circuit meets any of the criteria for review by certiorari set out in Rule 10, Rules of the Supreme Court. Therefore, review should be denied.

Questions 1 and 2 raise inquires relating to how 28 U.S.C. 2254(1)(d) operates. The state maintains that these issues were not presented or passed on by the Eleventh Circuit. Campbell v. Louisiana, 523 U.S. 392, 118 S. Ct. 1419, 140 L.Ed.2d 551 (1998), City of Springfield v. Kibbe, 480 U.S. 257, 107 S.Ct. 114, 94 L.Ed.2d 293 (1987). To the extent that these issues could be considered passed upon by the decision of the Eleventh Circuit, there exists no basis for granting the writ. In Williams, this Court has recently decided how the statutory provision operates. In Williams, a majority of this Court interpreted section 2254(d)(1), and decided what was a decision that was "contrary to a decision of the United States Supreme Court". The Court also decided what was a "unreasonable application" of United States Supreme Court decisions. Thus the question in issue one, whether materially indistinguishable facts are required, and the question in issue two, whether the state court must reject Supreme Court precedent, have been decided by this Court in Williams. Additionally, the conflict between Circuit Court alleged by

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[2] Cox's fixation on an alleged ex post facto application of the statute is a red herring. The fact that a department of corrections applies a state overcrowding release statute improperly is irrelevant to the determination whether the assistance of counsel received by the inmate was constitutionally deficient and whether prejudice flows from the deficient performance.

petitioner no longer exists as it was resolved by this Court in Williams. Thus, no basis for granting review is presented.

Petitioner's questions 3 and 4 should not be the basis for the grant of certiorari. Respondent maintains that these issues were not presented or passed on by the Eleventh Circuit. Campbell v. Louisiana, 523 U.S. 392, 118 S. Ct. 1419, 140 L.Ed.2d 551 (1998), City of Springfield v. Kibbe, 480 U.S. 257, 107 S.Ct. 114, 94 L.Ed.2d 293 (1987). Thus, they are not subject to review. Moreover, they were not the basis for the Federal Court decisions from which petitioner is seeking review. The federal court's rulings can be summarized as: 1) counsel's performance was not deficient because he gave correct advice; 2) petitioner failed to establish prejudice flowing from the advice; 3) it was the state department of corrections which misapplied the statute until corrected by the State Supreme Court. Thus, the questions presented are unrelated to the facts of the case as determined by the Federal Courts. Therefore, no basis has been shown for this Court to grant Certiorari.

Respondent asserts that the petitioner has not shown a basis for the exercise of this Court's jurisdiction. The state asserts that questions 1 through 4 are not properly before this Court as they were not passed upon by the Eleventh Circuit. Moreover, the issues in questions 1 and 2 have been recently resolved by this Court in Williams and there has been no need shown for the issues to be revisited. Question 5 was decided by the Eleventh Circuit but was resolved on the ground that Cox has not shown either deficient performance or prejudice. Question 5 does not contain an issue of constitutional dimension, nor does it identify any error that needs correction. Having shown no basis to invoke this Court's certiorari jurisdiction, all relief must be denied.

CONCLUSION

Based on the above cited legal authorities and arguments, the respondent respectfully requests this Honorable Court to deny Mr. Cox's petition for a writ of certiorari.

Respectfully submitted,

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